

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of)	
1991)	
)	

**REQUEST FOR STAY
OF FACSIMILE ADVERTISEMENT RULES
SUBMITTED BY
THE CHAMBER OF COMMERCE OF THE UNITED STATES
THE COMMUNITY ASSOCIATION INSTITUTE
THE NATIONAL ASSOCIATION OF MANUFACTURERS
THE NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS
THE NATIONAL RESTAURANT ASSOCIATION
AND
THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

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August 8, 2003

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The Chamber of Commerce of the United States ("Chamber of Commerce" or "Chamber"), the Community Associations Institute ("CAI"), the National Association of Manufacturers ("NAM"), the National Association of Wholesaler-Distributors ("NAW"), the National Restaurant Association ("NRA"), and the National Federation of Independent Business ("NFIB") (collectively, the "Joint Petitioners") hereby petition the Federal Communications Commission ("FCC" or "Commission") to stay certain rules the agency recently adopted in the above-captioned proceeding.¹ Specifically, the Joint Petitioners seek an immediate stay of the unsolicited commercial fax rules to permit full reconsideration of the matter by the FCC. Such stay and reconsideration is necessary to enable the FCC to more fully understand the needs of the business community and to more appropriately revise its fax rules. Grant of the stay is warranted and in the public interest because immediate enforcement would interfere with countless

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed Reg 44144 (2003). The Joint Petitioners are requesting the Commission to grant a stay of just those rules that apply to unsolicited commercial faxes, including the provisions of 47 C.F.R. §§ 64.1200(a)(3) and 68.318.

accepted business to business practices. Moreover, the business community and the public must be given an opportunity to fully comment on these new rules before any 30-day compliance period is set by the FCC.

BACKGROUND

The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographic region of the country, including 3,000,000 businesses, 3,000 state and local chambers, 830 business associations, and 92 American Chambers of Commerce abroad. Members of the Chamber of Commerce include businesses of all sizes and sectors, including large Fortune 500 companies as well as home-based, one-person operations. The Chamber of Commerce and its members use facsimiles to communicate effectively amongst each other, as well as with other businesses, business associations and existing consumers.

CAI is a national non-profit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide the most effective guidance for the creation and operation of condominiums, cooperatives, homeowner associations, and planned communities. CAI represents more than 16,000 homeowners, community associations, community managers and affiliated professionals and service providers. CAI estimates that there are approximately 50 million Americans living in approximately 250,000 community associations.

NAM is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and medium companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

NAW represents wholesaler-distributors of virtually every product sold to industrial, commercial, contractor, institutional and retail customers. NAW's membership covers some 40,000 companies with 150,000 places of business – a significant portion of the nation's \$2.8 trillion per year merchant wholesale distribution industry.

NRA is the leading business association for the restaurant industry, which is comprised of 870,000 restaurant and foodservice outlets employing 11.7 million people. NRA has 60,000 member companies and represents more than 300,000 restaurant establishments. Its membership base consists of virtually every facet of the industry.

NFIB is the largest advocacy organization representing small and independent businesses in Washington, D.C. and all 50 state capitals. NFIB's purpose is to influence public policy at the state and federal level and be the resource for small and independent business in America.

The Commission's new unsolicited commercial fax rules require that prior express, written permission must be obtained before sending any unsolicited commercial facsimile transmission to any person. This consent must include the specific fax number(s) to which faxes may be sent. Perhaps most important to the business community, the Commission without clear notice abandoned the established business relationship exception that exempted fully accepted business fax practices.

The Joint Petitioners respectfully request the Commission to grant an immediate stay of the unsolicited commercial fax rules until the Commission has an opportunity to fully consider the comments of the Joint Petitioners and other business entities that have or will file Petitions for Reconsideration in this matter.

**THIS REQUEST FULLY COMPLIES WITH THE FCC STANDARDS
FOR GRANTING A STAY**

The Commission has established that, in ruling on requests for stays, it will generally consider the same factors used by courts in ruling on preliminary injunction motions.² Those factors include (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary injunctive relief; (3) the degree of injury to other parties if relief is not granted; and (4) the fact that the issuance of the order will further the public interest.³ Ultimately, however, the Commission reaches its decision on a case-by-case basis and no single factor is dispositive.⁴ Here, all four factors support the grant of a stay of the unsolicited fax rules.

First, the Joint Petitioners will be filing a Petition for Reconsideration that is likely to succeed on the merits. The business community was not given effective notice that the FCC was contemplating these wide-reaching new fax restrictions. Accordingly, the FCC did not have a sufficient record for making these changes, which raises fundamental issues both under the mandates of the Administrative Procedure Act and the First Amendment. These issues will be addressed in the Petition for Reconsideration that the Joint Petitioners intend to file. Indeed, without this record the FCC could not have fully considered the broad scope and application of the rules, the direct and indirect costs of business compliance, and the possible dampening effect on the U. S. economy.

The Joint Petitioners have received hundreds of calls, letters, and e-mails from members since the FCC amended its rules on July 25, 2003. The Chamber of Commerce, for example,

² See *In re AT&T Corp.*, 13 FCC Rcd. 14,508 (1998).

³ See *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958).

⁴ See *In re AT&T Corp.*, 13 FCC Rcd 14,508 (1998).

received more than 200 individual letters. Importantly, much of this member feedback is in the form of questions highlighting the practical need for a stay if only to clarify the new rules before the effective compliance date. More important, as a policy matter, the Commission needs to fully understand the impact of these rules before proceeding. Many business members have provided specific, tangible examples of serious disruption of their usual business practices with customers, clients and business partners if the rule goes into effect. Indeed, one day after the Chamber informed members, more than 200 wrote individual letters to FCC officials protesting the rule change.

Likewise, NAW notified its member companies of the promulgation of the FCC do-not-fax regulations and requested feedback on how the proposed restriction on fax communications would affect them. The response from NAW members was immediate, intense and consistent. All respondents indicated that the new regulations would be highly disruptive of the business operations of wholesaler-distributors, their suppliers and their customers.

Many indicated the many uses they make of facsimile communications to better serve their customers and to receive information about products and services from their suppliers. Respondents noted that they already make concerted efforts to remove from their fax lists anyone who asks them to do so, pointing out that it is in their interest to do so. Many expressed reactions ranging from confusion to anger that the proposed restrictions seem to ignore all generally accepted, appropriate business practices. The following verbatim excerpts from NAW member company responses are strong evidence of the very serious negative impact the FCC action would have on business and the economy:

- "I have read the analysis of this regulation. It seems unrealistic to me. We communicate with our customers daily in person, by phone, by mail, by email, and by fax. Many times we are making special offers to customers at a lower than published prices. We will typically call large customers about a temporary discount but fax smaller companies. This only hurts the little guy."

- “Ours is a company that uses a variety of media formats to communicate with our customers, one of which is the fax. While our sales and customer service department bear the brunt of the communications responsibility, we have found that ‘touching’ our customers, using various methods, keeps them more thoroughly informed than they otherwise would be. The fax is an inexpensive yet efficient way to do this.”
- “This new regulation will cause more problems for our customers than us. Now we’ll have to get their permission to send them quotes they expect on a regular basis. It will also waste the time of their & our employees to keep records of letters, generating more paperwork for all. This will only hinder us in our relations with regular customers.”
- “This act/law would be an unfair restriction on our ability to promote and work with our customers who rely on us for product updates, new releases and even updated inventory sheets. This would particularly hamper our ability to serve and help the smaller businesses who often do not have a sales rep assigned to them. They rely on database marketing efforts to keep informed and up to date on the latest products and services.”
- “We have over 22,000 customers that we communicate with on a regular basis via fax. Our customers expect to see weekly specials opportunities to purchase discounted or special merchandise that helps them run their business on a more competitive basis. While we could move from fax to email with some customers, typically the single veterinarian practice (our largest customer segment) does not have ‘state of the art’ computer and Internet connectivity and this would be a competitive disadvantage for the smaller customer.”
- “We have 600 independent distributor locations and we are heavily dependant on power faxes for our normal business. I have instructed our staff to take immediate action to obtain these signatures as a defensive measure. The FCC may have good intentions but I don’t think they know how vital this communication link is to a business such as ours.”

Second, the Joint Petitioners will suffer irreparable harm absent a stay. As the Supreme Court has stated, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁵ Moreover, irreparable harm in the form of incurred business costs and lost business will also occur absent a stay. As the FCC is fully aware, there is considerable confusion in the business marketplace about the details of the rule, including its effective date, because of mandatory review by the Office of Management and

⁵ *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

Budget under the Paperwork Reduction Act. An official FCC order staying the rule will clear up the confusion and save millions of dollars. Many legal advisors are telling clients that the deadline for compliance is August 25, 2003, an impossible burden to business across America. Even the more likely deadline, 30 days after the FCC gives further notice in the Federal Register that the Paperwork Reduction Act review has been completed, would create irreparable damage to business in the form of compliance costs and disruption of normal business relationships.

Just using the Chamber of Commerce as an example, under the new rules, the Chamber is required to obtain express, written consent from all of its members. To do so the Chamber will have to contact tens of thousands of its direct members to obtain consent for the faxes. Requiring the Chamber of Commerce to obtain this consent within thirty days, with little advance warning, and without the use of fax or the telephone, is unreasonable. If the Commission does not stay its unsolicited fax rules, the Chamber of Commerce will be forced to curtail communications between itself and its members, reducing its efficiency and effectiveness and increasing costs that cannot later be recovered. Applying the same analysis to every business and association in America, it is clear that all will suffer similar irreparable harm from the interruption of traditional, fully accepted communications practices.

Third, a stay of the rules will not significantly harm other parties. The Joint Petitioners direct most of their faxes to members. The Joint Petitioners maintain established business relationships with these members, and these members are accustomed to receiving these faxes. This is true throughout the business community. Moreover, prior to the adoption of the new unsolicited commercial fax rules, there was no evidence that these types of faxes caused any serious harm to the parties who received them. Staying the effective date of these new rules will merely maintain the *status quo* until the Commission has a chance to fully reconsider the matter.

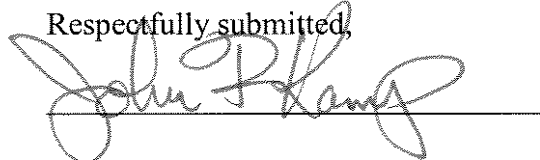
Doing so will not cause any harm to other parties and will avoid the irreparable harm, described above, to the Joint Petitioners.

Fourth, the public interest supports granting a stay of the unsolicited fax rules. Immediate enforcement of the unsolicited commercial fax rules will interfere with the operations of the business and associations that are members of the Joint Petitioners, as well as with the communications between the Joint Petitioners and their members. Inevitably, the stream of commerce will be inhibited during this critical early stage of the economic recovery.

CONCLUSION

For the foregoing reasons, the Joint Petitioners request the Commission to grant a stay of the unsolicited fax rules.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John F. Kamp", is written over a horizontal line.

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August 8, 2003

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